Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

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REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

The Commercial Internet eXchange Association ("CIX"), by its attorneys, respectfully submits these reply comments in response to the Commission's Notice of Proposed Rulemaking, FCC 96-149 (released July 18, 1996) (the "NPRM").

I. INTRODUCTION AND SUMMARY

The Commercial Internet eXchange Association ("CIX") is the nation's largest trade association of Internet access and Internet service providers. CIX presently consists of approximately 150 domestic and international members, ranging from large providers of Internet backbone service, to small "dial-up" local providers. (A copy of a recent CIX membership list is

attached hereto.)[1] The organization's members carry over 75% of the nation's Internet traffic. As a non-profit organization for the industry, CIX works to facilitate global connectivity among commercial ISPs, and to foster fair and open environments for Internet interconnection and commercialization.

CIX members offer access to the Internet, and other information services, such as web site hosting and selection and provision of content. Internet access is a service that permits users to obtain information stored on, and to send information to, other computer servers that are part of the network of networks that comprise the Internet. The service permits users to obtain and make available information over the Internet. Internet service providers provide other services, such as hosting web sites on their computer servers, building and managing intranets and other private wide area networks, and offering subscribers access to USENET newsgroups and mailing lists, as well as individually designed value added news delivery.

CIX believes that structural separations play in important part in creating an environment in which competition flourishes. The 1996 Act offers enormous potential for competitive benefits to American consumers, benefits that the highly competitive Internet market brought consumers before passage of the 1996 Act.

But the 1996 Act's promise is also to some extent a threat. In markets such the Internet, presently populated by a mixture of small and large providers engaged in vigorous competition, the entry of entities that still exercise effective monopoly control of the local loop offers serious risks of anti-competitive behavior and cross subsidies that would unfairly crush smaller competitors. For this reason, CIX asks the Commission to give full effect to the structural separation provisions of Section 272, to preserve existing safeguards against anti-competitive

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1 These reply comments represent the views of CIX as a trade organization and are not necessarily those of individual members.

conduct in interLATA enhanced services at least until expiration of the separate affiliate requirement, and to strengthen safeguards against such conduct in intraLATA services.

II. SECTION 272 REQUIRES THAT BOCS PROVIDING INTERLATA INTERNET SERVICES DO SO THROUGH A SEPARATE AFFILIATE

A. The Definition Of "Information Services" In The '96 Act Is At Least As Broad As The FCC's "Enhanced Services" Definition

The NPRM asks in ¶42 "whether all activities that the Commission classifies as 'enhanced services' fall within the statutory definition of 'information service.'" CIX agrees with numerous parties addressing this issue that services included within the enhanced services definition, 47 C.F.R. § 64.702(a), are also covered by the Act's information services definition. Indeed, CIX interprets the 1996 Act's definition of an "information service" as being at least as broad, and in some respects broader, than the Commission's enhanced service definition. Specifically, the term "making available information via telecommunications,"[2] is broader than the terms of the enhanced service definition, covering all means of making information available to others through this medium.

The remaining elements of the enhanced service definition are covered by other elements of the information service definition. The information service functions of "transforming" and "processing" information correspond closely to "act[ing] on the format, code, protocol and similar aspects of subscriber's information." The terms "acquiring," "generating," "transforming," and "utilizing" information correspond closely to "providing subscribers additional, different or restructured information." Furthermore, the capabilities of "storing" or

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2 47 U.S.C. § 153(20).

"retrieving" information cover "subscriber interaction with stored information." Compare 47 U.S.C. § 3(20) with 47 C.F.R. § 64.702(a).

Plainly, just as Internet access is an enhanced service, it is also an "information service."[3]

B. BOCs Are Required to Offer InterLATA Information Services Through a Separate Affiliate

The Commission is correct in its tentative conclusion that BOCs providing in-region and out-of-region interLATA information services must do so through a separate affiliate. NPRM at ¶ 41. The plain language of the 1996 Act forecloses all arguments to the contrary.

Even though Section 272(a)(2)(C) expressly requires that interLATA information services be provided through a separate affiliate and makes no exception for in-region services, a few parties attempt to argue around that express requirement. Pacific Telesis contends that because information services were "previously authorized" under the modified MFJ, they are excluded by Section 272(a)(2)(B)(iii)'s exception for "previously authorized activities described in section 271(f)." See Comments of Pacific Telesis, at 5-6. This argument rests upon a negative implication from the report language for the section that is contradicted by the plain language of the statute.

The exceptions of Section 272(a)(2)(B) apply only to "interLATA telecommunications services," and not to information services. Indeed, interLATA information services (other than

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3 However, CIX notes the Commission's observation in its First Report and Order, CC Dkt. Nos. 96-98 & 95-185, FCC 96-325 (released Aug. 8, 1996), in the Interconnection proceeding that information service providers who also provide telecommunications services should be classified as telecommunications carriers for purposes of Section 251. Id. at ¶ 995.

electronic publishing and alarm monitoring) are specifically included in the separate affiliate requirement in the very next subsection, Section 272(a)(2)(C).

BellSouth's argument suffers from the same flaw. It attempts to rely upon the "incidental interLATA services" and "out of region" exceptions of Sections 272(a)(2)(B)(i) and (ii). See Comments of BellSouth, at 21-25. Like the previously authorized activities exception of Section 272(a)(2)(B)(iii), these exceptions apply only to "interLATA telecommunications services." Neither of these sections in any way affects Congress' express choice in Section 272(a)(2)(C) to require that interLATA information services be provided through a separate affiliate.[4]

III. SECTION 272(C)(1)'S BROAD PROHIBITIONS AGAINST BOC DISCRIMINATION MUST BE GIVEN FULL EFFECT

In adopting Section 272, Congress chose not only to require BOCs to conduct specified activities through separate affiliates, but also to enact broad non-discrimination safeguards. Section 272(c)(1) prohibits BOCs from discriminating in favor of their affiliates against "any other entity in the provision . . . of goods, services, facilities and information, or in the establishment of standards."

This provision applies broadly to "any other entity," including information service providers. Furthermore, Section 272(c)(1) sets forth unequivocal, straight-forward prohibitions

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4 BellSouth's reliance upon a must-carry decision, Century Communications Corp. v. FCC, 835 F.2d 292, 298-99 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988), for the proposition that the separate affiliate requirement is a "prior restraint" is misplaced. See Comments of BellSouth, at 20 n.48. The separate affiliate requirement does not prevent the BOCs from speaking (or require them to speak), it is merely a "time, place and manner" restriction that requires BOCs to provide information service through a separate affiliate. As the NPRM explains, this restriction serves the strong government interests in preventing cross-subsidies and protecting competition. NPRM ¶¶ 5, 7, 8.

against discrimination, and contains no exceptions. Arguments from some parties that the Commission should be "selective" in implementing these provisions is contrary to the statute. The NPRM asks in ¶ 67 whether the terms "facilities," "services" and "information" in Section 272(c)(1) have different meanings than in Section 251(c). Because Section 272(c)(1)'s non-discrimination provision is not limited or conditioned in any manner, the answer is that their meaning is at least as broad as the meaning of those terms in Section 251(c).

Therefore, Section 272(c)(1) offers information service providers unbundled access to the local loop and other network elements independent of Section 251 wherever BOCs provide their affiliates with such access. Section 272(c)(1)'s prohibition against discrimination in the provision of "facilities" plainly prevents BOCs from discriminating against information service providers when BOCs offer unbundled local loop access to their affiliates.

IV. CEI AND ONA SHOULD BE STRENGTHENED, NOT WEAKENED, IN LIGHT OF THE 1996 ACT

The NPRM asks, in ¶¶ 40 and 41, whether any of the Computer II, Computer III and ONA rules are "inconsistent with" or "unnecessary" in light of the 1996 Act. Congress' decision to include non-discrimination requirements in Sections 272(c)(1) and (e) bolsters, rather than weakens, the basis for structural and non-structural safeguards for enhanced service providers.

A. The *Computer II* Structural Separations Should Be Restored For IntraLATA Enhanced Services For the Duration of the Separate Affiliate Requirement

Nearly two years have elapsed since the decision in California v. FCC, 39 F.2d 919 (9th Cir. 1994) ("California III"), reversing the Commission's cost-benefit analysis in abandoning Computer II structural separations. Before passage of the 1996 Act, many parties raised

compelling arguments in the California III remand proceeding[5] urging a return to structural separations for BOC provision of enhanced services.

Congress' intervening decision to adopt structural separations in the interLATA context supports returning to Computer II safeguards for the duration of the separate affiliate requirement. While Congress did not legislate on the issue of intraLATA structural separations, where it did legislate -- in the context of interLATA services -- it chose to require structural safeguards on a temporary basis. The arguments for such safeguards intraLATA are equally strong. Indeed, evidence from the Computer III remand proceeding suggests that the need for such safeguards for intraLATA service is compelling.[6]

Furthermore, intraLATA structural separations would be easier for the Commission to administer without being burdensome for the BOCs to implement. A uniform regulatory standard would be simpler from a regulatory point of view and would eliminate the significance of the hazy boundary between interLATA and intraLATA information services, thereby simplifying market incentives. What is more, because the BOCs will be establishing separate affiliates for provision of interLATA information services in any event, the incremental regulatory burden should not be significant.

B. In Any Event, the Commission Should Not Weaken CEI/ONA Safeguards

The 1996 Act specifically envisions the continuing viability of such safeguards unless the Commission finds that they are superseded by the 1996 Act. 47 U.S.C. § 251(g). There is no valid basis for concluding that they should be so superseded.

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5 Notice of Proposed Rulemaking, CC Dkt. No. 95-20, FCC 95-48 (rel. Feb. 1995).

6 See, e.g. Reply Comments of Commercial Internet eXchange Association, CC Dkt. No. 95-20 (filed May 19, 1995).

The protections of Section 272 do not apply to intraLATA services, where BOCs would otherwise be free to exploit their monopoly market power against enhanced services competitors. Nor has the Commission ruled that information service providers are entitled to unbundled access to the local loop.

As for interLATA information services, Section 272's separate affiliate protections presumptively sunset after four years. After the sunset, not only will BOCs bring their full market power to bear in the interLATA information services market, they will also be subject to the weaker non-discrimination provisions of Section 272(e). It is therefore entirely premature for the Commission to relax these safeguards when as early as three and a half years from now, information service providers may face renewed anti-competitive tactics from telecommunications giants.

V. CONCLUSION

For the foregoing reasons, CIX urges the Commission: (1) to rule that BOCs are required to offer interLATA information services, including all Internet services, through a separate affiliate under Section 272; (2) to adopt regulations giving full effect to Section 272(c)(1)'s broad anti-discrimination requirement; (3) to implement structural separations for intraLATA services for the duration of the Section 272 separate affiliate requirement; and (4) not to weaken the Computer II, Computer III and ONA safeguards until after it has the opportunity to assess the state of competition in the information services market following the sunset of the separate affiliate requirement.

The Commission's adoption of strong safeguards to protect Internet service providers, as well as other information service providers, from anti-competitive conduct is an important

element of achieving the 1996 Act's promise of true, vibrant competition in communications markets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 1996, a copy of the foregoing Reply Comments of the Commercial Internet eXchange Association was mailed, postage prepaid to the following:

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